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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 786

EDWARD M. WINSTON,
Petitioner,

vs.

THOMAS J. COURTNEY, State's Attorney, COUNTY OF COOK, a Municipal Corporation of the State of Illinois, and others,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

There heard on appeal from the Circuit Court of Cook County.

REPLY TO ANSWER TO THE PETITION FOR WRIT OF CERTIORARI.

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INDEX TO AUTHORITIES CITED.

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To The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner for Reply to the Answer by Respondents; says that there are special and important reasons for a review by writ of certiorari, which are adequately shown by his petition filed in this Court. That substantial questions under protection of the constitution of the United States were raised and decided in the Illinois Courts in this case.

That the the final decision by the Supreme Court of Illinois was *ex post facto* legislation, and did deprive the petitioner of vested rights without due process of law, without equal protection of law, and did impair the obligation of the contract made with petitioner by the County of Cook and State of Illinois, and said rulings by the Illinois Courts decided Federal questions in conflict with applicable decisions of this Court and departed from the usual and accepted course of judicial procedure.

Wherefore your petitioner asks again that the writ of certiorari be granted as prayed by his petition.

Petitioner comments upon the brief by the respondents as follows:

I. and III.

Cases cited by respondents are not in point.

To defeat the jurisdiction of this court to review this record now at bar, respondents rely upon the case of *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444. In that case at page 450, this Court quoted Section 237 of the Judicial Code as amended February 17, 1922, reading as follows:

> "In any suit involving the validity of a contract wherein it is claimed that a change in the rule of law or construction of statutes by the highest court of a state applicable to such contract would be repugnant to the Constitution of the United States, the Supreme Court shall, upon writ of error, re-examine, reverse, or affirm the final judgment of the highest court of a state, in which a decision in the suit could be had, if said claim is made in said court at any time before said final judgment is entered and if the decision is against the claim so made."

The petitions for rehearing (Tr. 81-158) in the instant case were denied by the Supreme Court of Illinois without any written opinion thereon (Tr. 159).

With reference to that amended statute, the opinion by Your Honors in the *Tidal Oil Company* case, at page 455, made the following ruling:

> "It was the purpose of the Act of 1922 to change the rule established by this formidable array of authorities as to the class of cases therein described. The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

Counsel for respondents probably overlooked the fact that in the *Tidal Oil Company* case, there had not been any construction of the state statutes or constitution by the state courts, and consequently no reliance therein by the parties in the legal acts and documents there under review, and consequently there had been no departure by the state courts from a settled construction of the state law established by state decision upon state statutes or constitution prior to the time of the acts upon which the rights were claimed to be based in the *Tidal Oil Company* case.

A like situation exists with reference to the case of *Toole County Irrigation District* v. *Moody*, 125 Fed. (2d) 498, upon which also respondents place reliance. The opinion in that case at page 500 reads as follows:

> "At the time the bonds here involved were issued (1921 and 1922), the Supreme Court of Montana had not decided whether bonds issued under chapter 146 constitute general obligations of the issuing district or merely a charge against the lands within such district."

In that *Toole County* case there was no decision by the court from which a departure could be made by Court action. The contrary is true in the case at bar. There were more than sixty years of Illinois court decisions interpreting the Constitution and the statutes of Illinois pertaining to the subject matter *before the contract at bar was made between the petitioner and Cook County.*

That fact governed that case and completely distinguishes that line of cases from the record and situation now at Bar.

The petitioner is here with the record wherein the Supreme Court of Illinois, by its two opinions and ruling in this case, for the first time, makes departure from the rulings by itself and the Appellate Court of Illinois, as to the established meaning and effect of the constitution and statutes of Illinois, as disclosed by many decisions over a period of more than sixty years, prior to the time that the legislative act and contract by the County Board of Cook County was enacted and the contract now at bar was entered into with this petitioner in the year 1931.

The decisions by the Supreme and Appellate Courts of Illinois during said sixty years, before this contract was made, necessarily became an established part of the statute and constitution of the State of Illinois, many decades before this contract relying thereon. During all of these years and to this date, the legislature of Illinois did not change that meaning and construction of said statutes of the State of Illinois. The sudden departure by the Supreme Court of Illinois, in the instant case, is not a construction or interpretation of the statute and the constitution, but is in fact nothing more or less than outright judicial legislation, and an outright seizure

by the court of legislative power belonging to another branch of the government of the State of Illinois.

In the case of *State of Indiana ex rel. Anderson* v. *Brand*, 303 U. S. 95 the suit was

> "Mandamus by the State of Indiana, on the relation of Dorothy Anderson, to compel Harry Brand, Trustee of Chester School Township of Wabash County, Ind., to continue relatrix in employment as a public school teacher. To review a judgment, 5 N. E. 2d. 531, 110 A. L. R. 778, affirming a judgment sustaining a demurrer to the complaint, relatrix brings certiorari.
>
> "Reversed and remanded."

In that case at Page 105, this Court stated:

> "Until its decision in the present case the Supreme Court of the State had uniformly held that the teacher's right to continued employment by virtue of the indefinite contract created pursuant to the act was contractual."

In that case Your Honors took jurisdiction on petition for writ of certiorari to the State's Supreme Court, and Your Honors decided the case, and reversed the ruling made by the Supreme Court of Indiana.

The final opinion by the Supreme Court of Illinois now under review, states the following language:

> "Section 22 of article VI of the constitution creates the office of State's Attorney and provides for his election. Section 32 of the same article refers to the residence, the performance of the duties of the State's Attorney and other officers and the manner in which vacancies in any of such offices may be filled. *It is provided that* 'all officers (which includes *State's Attorneys*), where not otherwise provided for in this article, *shall perform such duties* and receive such com-

pensation *as is or may be provided by law.' It will be observed that these constitutional provisions do not prescribe the specific duties of the State's Attorney.* It has been held that the State's Attorney is an officer provided for by the constitution and that he is a county officer. *Cook County* v. *Healy*, 222 Ill. 310, 78 N. E. 623. * * *

"The law is well settled that when the constitution or the laws of the State create an office, *prescribe the duties of its incumbent* and fix his compensation, no other person or board, except by action of the legislature, has the authority to contract with private individuals to expend public funds *for the purpose of performing the duties which were imposed upon such officer*. *Fergus* v. *Russel*, 270 Ill. 304, 110 N. E. 130, Ann. Cas. 1916B, 1120; *Stevens* v. *Henry County*, 218 Ill. 468, 75 N. E. 1024, 4 L. R. A., N. S., 339, 4 Ann. Cas. 136; *Hope* v. *City of Alton*, 214 Ill. 102, 73 N. E. 406. The contracts of employment under which appellants claim were ultra vires and void."

Only the County Board has authority.

By italics above, we emphasize that part of the opinion now under review, which admits the truth of the contention at (A-2) at page 10; and (C-3), (C-4) and (C-5) at page 13; (E) at page 14; (F) at page 15 of brief for petitioner: That the State's Attorney of Cook County is an officer of the county created by the Constitution of Illinois 1870, which does not prescribe for him any duties whatever, and that he has no common law powers or duties, and is not a successor in any sense of the Attorney General of England, or the Attorney General of the State of Illinois, and that he has no powers and no duties other than those which may be prescribed by the legislature of the State of Illinois. And that all powers or duties so prescribed by statute, must be in deference to those powers and duties which by statute and constitution of State of

Illinois, are vested in the County Board of Cook County as the Constitutional Legislative Body for that County. Stated at (A-1), page 10 of petition, Section 7 of Article X, Constitution of 1870, (makes provision for the government of Cook County different from the other 101 Counties of the States),thereby giving Cook County real home rule, as follows:

> "Sec. 7. Cook County, government of
> "The county affairs of Cook County shall be managed by a board of commissioners of fifteen persons, ten of whom shall be elected from the City of Chicago, and five from towns outside of said city, in such manner as may be provided by law."

When the legislature of Illinois, pursuant to that constitutional provision, stated in detail certain duties of the County Board of Cook County, which are set forth at (A-3) page 10 to (B-3) page 12 of brief for petitioner. Those powers and duties are not in any sense or manner taken from the State's Attorney, because he never had them. To give them to him would be in derogation of the express language of the constitution at section 7, Article X, quoted above.

The limited nature of the powers and duties of the State's Attorney of Cook County was thoroughly canvassed by the Supreme Court of Illinois, in the case of *People* v. *Newcomer*, 284 Ill. 315, where the court discussed the history of the office of Attorney General of England, and the history of the office of Attorney General of Illinois, and definitely stated that the State's Attorney of Illinois did not possess any of their powers, and was not a successor to them, but that the State's Attorney of Cook County had only such duties and powers as may be provided by statute, in keeping with the Constitution of Illinois vesting sovereignty in other persons and authorities. That opinion by the Supreme Court of Illinois in *People*

v. *Newcomer* is too long for quotation here, but the conclusion of that opinion at page 323 reads as follows:

> "The court *will not consider the powers of the Attorney General of the state,* who under our Constitution is a state officer and a member of the executive department of the state representing the sovereignty of the people, *but does not regard the powers of the state's attorney as co-extensive with those of the Attorney General,* who is a chief law officer of the state and head of the legal department. *Fergus* v. *Russel,* 270 Ill. 304. *The state's attorney is a county officer* elected for and within a county *to perform his duties therein and is by statute charged with certain duties. Cook County* v. *Healy,* 222 Ill. 310."

Filing this suit was ultra vires any power vested in State's Attorney.

We have shown at page 13 of brief for Petitioner:

> "There was no common law 'States Attorney'. There are no common law powers of States Attorney. The States Attorney provided for by the Constitution for Illinois 1870, was an entirely new office. The Constitution does not specify any duties for that office".

These statements are confirmed by the case of *People* v. *Newcomer,* 284 Ill. 315 as quoted hereinabove. Said constitutional provision (Article VI, section 22, Tr. 57, creates the office of State's Attorney as part of the Judicial division of the powers of government in Illinois. At page 10 of our Petition we relied upon Article III of the Constitution of Illinois 1870, which reads as follows:

> "The powers of government of Illinois are divided into three distinct departments: the legislative, executive and judicial: and no person or collection of persons being in one of those departments shall exercise any power properly belonging to either of the others."

The scope of the power to act must be traced to the constitution itself: *Greenfield* v. *Russell,* 292 Ill. 392 at 400.

At page 7 the brief for respondents says that Thomas J. Courtney as State's Attorney filed this instant information in equity against Winston and others to stay payment of compensation under his contract with Cook County, the information charging that the contract was ultra vires the power of Cook County. This statement as to party plaintiff—Thomas J. Courtney as State's Attorney—is confirmed by the record (Tr. 2; Rec. 44), and by both of the opinions of the Supreme Court in this case.

At page 13 of brief for Petitioner, it is shown by the case of *Biggins* v. *People,* 96 Ill. 481, that the State's Attorney has no authority to proceed in equity in any matter about taxes or revenue, unles a specific statute shall so provide. There is no statute to authorize him to file the instant information in equity as *State's Attorney.*

On the contrary the only enabling statute in that regard (Chapter 102, Section 12 of Illinois Revised Statutes) authorizes the Attorney General of Illinois so to act. That officer has not at any time in any court had any part in the conduct of this suit. Thereby it is shown again that this suit is mere oppression of the citizen by arbitrary assumption of executive power of government, which never did have any statutory nor other warrant.

II.

The Act of the Illinois Supreme Court in changing, after sixty years, its construction and interpretation of the Illinois Constitution and Statutes, was a downright departure which did operate to impair the operation of the contract made in 1931 with petitioner.

It is difficult to understand what is meant by the argument of respondents under Point II at pages 10 to 12 of their Answer. All they say is that the Supreme Court of Illinois is consistent with itself in its two opinions in this very case in this very record. Pettioner does not contend to the contrary. Petitioner has brought here for reversal on this record both opinions in 358 Ill. 146, and 384 Ill. 283. Petitioner has shown in his petition (Pages 14 and 17) that the first opinion was interlocutory and not final and reviewable in this court, until the second opinion was filed and adhered to. *Georgia Railway and Power Co.* v. *Decatur*, 262 U. S. 432 at 436. Decided June 4, 1923.

The result is that respondents admit, *as they must*, that the Supreme Court of Illinois only in this record and in these two opinions, have departed boldly and completely from all prior ruling by Illinois Courts which had been rendered for a period of sixty years, establishing the meaning of constitution and statutes on which petitioner relied and made his contract, *before the contract in this record was made*. In reliance upon those established decisions the contract was made between petitioner and the County of Cook in the year 1931.

I.

For the foregoing reasons the citation by respondent at page 9 of their answer of the case of *Cleveland and Pittsburgh Railroad Company* v. *City of Cleveland, Ohio*, 235

U. S. 50, has no bearing whatever upon the record in this case. Furthermore, that decision was in the year 1914, many years before the amendment to section 237 of the Judicial Code was made in 1922.

The most recent textbook discussion is as follows: Vol. 10, Cyclopedia of Federal Procedure, Chapter 57; at page 383 (Edmunds-Callaghan Edition 1944):

> "* * * a claim of federal right then presented may be in apt time under the special circumstances of the case, as where the asserted denial of the right resulted from the action of that court then taken which the claimant was not bound to anticipate and against which he was not bound to take other precautions at an earlier stage of the case; (47. *Great Northern Ry. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 77 L. Ed. 360, 53 Sup. Ct. 145; *Saunders* v. *Shaw*, 244 U. S. 317, 61 L. Ed. 1163, 37 Sup. Ct. 638.) and a federal question may be regarded as made in apt time where it raised in the state appellate tribunal and there decided adversely to the federal claim on its merits and not on the ground that it was not raised in the trial court below. (48. *Sully* v. *American Nat. Bank*, 178 U. S. 289, 44 L. Ed. 1072, 20 Sup. Ct. 93.)"

And further at page 387:

> "Only the questions discussed by the state Supreme Court are reviewed by the federal Supreme Court where the record does not show what, if any, federal questions were presented to the state court. *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Commission*, 287 U. S. 471, 80 L. Ed. 810, 56 Sup. Ct. 536."

And further at page 433:

> "* * * Where the federal question was actually dealt with and decided by the highest state court it is not essential that it shall have been passed upon by the trial court. (*Chicago, R. I. & P. R. Co.* v. *Perry*, 259

U. S. 548, 66 L. Ed. (7. 1056, 42 Sup. Ct. 542.) A claim that a constitutional question was not involved in the state decision because of a waiver before suit cannot prevail to defeat the jurisdiction of the Supreme Court to review the decision where the highest state court deemed it necessary to pass on the question, which was properly made in the suit, and no other legal grounds appear on which its decision against the federal claim can be supported. (8. *Chicago, R. I. & P. Ry. Co.* v. *Perry*, 259 U. S. 548, 66 L. Ed. 1056, 42 Sup. Ct. 524.)"

And further at pages 437 to 440:

"It is important to keep in mind that the Supreme Court is the sole judge of its own appellate jurisdiction and it is for that court alone to determine whether, accepting the state court's construction, federal rights or claims are affected thereby so as to give the state judgment the requisite reviewable characteristics. (36. *Ward & Gow* v. *Krinsky*, 259 U. S. 503, 66 L. Ed. 1033, 42 Sup. Ct. 529, 28 A. L. R. 1207.) The determination of the jurisdiction of the Supreme Court to review a state judgment, including the question whether the judgment possesses the requisite reviewable characteristics, necessarily devolves upon the court alone. (37. *Newport Light Co.* v. *City of Newport*, 151 U. S. 527, 38 L. Ed. 259, 14 Sup. Ct. 429; *Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. Ed. 1134, 14 Sup. Ct. 166. The question whether the decision of a federal questionby the state court was necessary to the determination of the cause, is itself a federal question which the Supreme Court must decide. *Honeyman* v. *Hanan*, 400 U. S. 14, 81 L. Ed. 476, 57 Sup. Ct. 350.) Thus, it will decide for itself the existence of a federal question in the case, although the state court decided that none existed, and it will determine for itself all questions as to the operation and effect of the state statute on federal rights or claims and all jurisdictional questions incidental thereto. Where it is asserted that state legislation as construed and applied operates to impair existing contract obligations, the Supreme Court will determine all questions as to the existence,

construction, effect and validity of the asserted contract obligations, and it will inquire into the state decision and determine, not only whether the federal claim was decided in express terms, but whether it was decided in substance and effect, by supporting the decision on nonfederal grounds which are without fair or substantial support. In determining whether the requisite federal question is present in the state decision and was decided by the state court, the Supreme Court will look to the necessary effect of the state decision. (42. *Woodruff* v. *Mississippi*, 162 U. S. 291, 40 L. Ed. 973, 16 Sup. Ct. 820; *Huntington* v. *Attrill*, 146 U. S. 657, 36 L. Ed. 1123, 13 Sup. Ct. 224.) and not to the reasons assigned by the state court for the conclusion reached (42. *Hartford Life Ins. Co.* v. *Barber*, 245 U. S. 146 62 L. Ed. 208, 38 Sup. Ct. 54, rev'g judgments 269 Mo. 21, 187 S. W. 867, and 268 Mo. 363, 187 S. W. 874; *St. Louis, I. M. & S. Ry. Co.* v. *McWhirter*, 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. 858.) or the form which the state court adopts in passing upon the judgment of the court below (44. *Williams* v. *Bruffy*, 102 U. S. 248, 26 L. Ed. 135.) or the grounds upon which its decision is based, especially if they appear to be evasive or merely colorable (46. *Rogers* v. *Alabama*, 192 U. S. 226, 48 L. Ed. 417, 24 Sup. Ct. 257.) or whether it decided the federal question correctly or not. (47. *Bates* v. *Bodie*, 196 U. S. 520, 62 L. Ed. 444, 38 Sup. Ct. 182; *Andrews* v. *Andrews*, 188 U. S. 14, 47 L. Ed. 366, 23 Sup. Ct. 237; *Blythe* v. *Hinckley*, 180 U. S. 333, 45 L Ed 557, 21. Sup. Ct. 390.) In determining such questions the court is not limited to consideration of the language of the state decision. The question whether the federal question is sufficiently presented by the pleading of the party asserting must be determined by the Supreme Court independently of the views held by the state court. (49. *Covington & L. Turnpike Road Co.* v. *Sandford*, 164 U. S. 578, 41 L. Ed. 560, 17 Sup. Ct. 198.)"

The opinions in this case make reference to some rec-

ords of other cases which were decided at the same time. That fact does not make those cases of any importance upon this review. The court records of those cases were and remain separate and distinct at all times. They have not been brought here. Whatever was said about those cases is not now pertinent. The record in case 27169 is the only one brought here from the Supreme Court of Illinois. That record is complete and unabridged for this review.

Public importance of this case.

This is not a political case. We present for review a breach of basic civil rights fully as much as the recent *Texas* case heard in this Court. This case has as wide public interest and importance as had the case of *Brand* v. *Indiana* mentioned above. As shown at pages 36 and 38 of Petition and Tr. 100-137, the County Board continuously and currently ever since the Year 1870 when the Constitution was adopted, has employed and has paid many attorneys for many sorts of legal services entirely outside of the Staff who are permanently employed as full time Assistant State's Attorneys.

Not only all Members of the County Board for more than seventy years, but also all such employees for that period, are placed under the cloud of these opinions brought here for review. See Tr. 110. Furthermore the future conduct of the county business for more than four million people is directly involved.

Therefore Petitioner renews the prayer of his Petition.

Respectfully submitted,

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